STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: October 26, 2022)

JOHN AND JILL HAYES,	:	
Appellants,	:	
	:	
v.	:	**C.A. No. WC-2020-528**
	:	
CHARLESTOWN ZONING BOARD OF REVIEW; THE TOWN OF CHARLESTOWN; RAYMOND DRECZKO, JR, in his capacity as Chair and a Member of the Charlestown Zoning Board of Review; ROBIN W. QUINN, in her capacity as a Member of the Charlestown Zoning Board of Review; CLIFFORD L. VANOVER, in his capacity as a Member of the Charlestown Zoning Board of Review; JOSEPH QUADRATO, in his capacity as a Member of the Charlestown Zoning Board of Review; LARA WIBETO, in her capacity as a Member of the Charlestown Zoning Board of Review; JOHN E. LOVOY, in his capacity as a Member of the Charlestown Zoning Board of Review; RENE J. PINCINCE, in his capacity as a Member of the Charlestown Zoning Board of Review; and PAMELA MASSIMI,	:	
***Appellees*.**	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is the zoning appeal of John and Jill Hayes (Appellants) from the November 17, 2020 Record of Vote of the Town of Charlestown Zoning Board of Review (Zoning Board) approving Pamela Massimi's (Petitioner) August 20, 2020 application for a dimensional variance. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

A

Dimensional Variance Application

On August 20, 2020, Petitioner applied to the Zoning Board for a dimensional variance (Application) for her Charlestown, Rhode Island property (Property). (Appl. at 1.)[1] Petitioner's building plans show that she seeks to demolish the current one-story residence and build a three-story home using the existing foundation. *Compare* Assessor's Card at 2 *with* Front Elevation.

Petitioner has owned the Property since 2000. (Assessor's Card at 1.) The lot has 100.5 feet of frontage and is 389 feet deep, extending from West Beach Road to Quonochontaug Pond. (Appl. at 1; Plot Plan.) The parcel totals 38,333 square feet or approximately one acre. (Appl. at 1.) It is a prior nonconforming substandard lot in an R3A zoning district, which otherwise requires three acres and 300 feet of frontage. (Code of the Town of Charlestown, ch. 218, Attach. 2 "Dimensional Table.")[2] The residential structure on the Property, built in 1956, is also nonconforming, encroaching into the front and left setback areas. (Assessor's Card at 1; Appl. at 2.) For the new structure, because Petitioner seeks to use the existing foundation, she requests relief from the Town's setback requirements similar—if not identical—to the existing encroachments; approximately six feet of relief from the front setback requirement of forty feet and seven-and-a-half feet of relief from the right-side setback requirement of twenty feet.[3] (Appl.

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[1] Documents in the Certified Record are not marked as enumerated exhibits and will be identified in this Decision by the document titles listed on the Record page titled "Building/Zoning Official file" followed by a page number where appropriate. The Application is not paginated but contains only two pages.

[2] Chapter 218 is hereinafter referred to as the "Zoning Ordinance."

[3] The Application requests a "Right Side" variance and then describes the request as "front and *left* side setbacks." (Appl. at 2.) As depicted in the Plot Plan prepared by Dowdell Engineering,

at 2.) The current structure is a one-story, ranch-style home with 1,564 square feet, two bedrooms, two bathrooms, and no garage. (Assessor's Card at 1.)

Because the Property is also located in a flood zone, Petitioner desires to make the new home compliant with Federal Emergency Management Agency (FEMA) requirements. (Appl. at 2.) According to Petitioner, this will require filling in the existing unfinished basement, causing her to lose approximately 1,500 square feet of storage space. (Tr. 13:1-5, 26:2-7, Oct. 20, 2020.) Petitioner and her expert also testified that FEMA regulations dictate that any living levels must be elevated above the flood zone. (Tr. 9:11-10:21, Sept. 15, 2020; Tr. 56:23-57:4, Oct. 20, 2020.) To that end, the new home will include a ground floor to be used as a garage and storage space with mechanicals suspended from the ceiling above the flood zone. (Ground Plan; Tr. 10:16-21, Sept. 15, 2020.) Above the garage will be two levels of living space, including two bedrooms, three bathrooms, and "open space" that Petitioner intends to use for office space, fitness equipment, and storage. (Tr. 10:21-11:14, Oct. 20, 2020.) In total, the two levels of living space would measure approximately 2,800 square feet. (Tr. 10:13, Sept. 15, 2020.)

The Property is also located within fifty feet of coastal wetlands, requiring compliance with Coastal Resources Management Council (CRMC) regulations and approval from CRMC before commencing construction. (Tr. 51:8-16, Oct. 20, 2020.) By regulation, Petitioner may seek CRMC approval only after obtaining the necessary approvals from the Zoning Board. *Id.* at 60:15-61:14. Notwithstanding that prescribed order of approvals, before filing her Application, Petitioner communicated with Amy Silva, Senior Environmental Scientist for CRMC. *Id.* at 13:22-14:5; Email Correspondence Between Applicant & Amy Silva (Silva Email). Petitioner

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Inc. and as discussed before the Zoning Board, Petitioner has requested a right-side variance. (Plot Plan; Tr. 2:9-11, Sept. 15, 2020.)

"didn't want to have to go through all of the designing of a house and a foundation and getting a building permit and doing everything and having [CRMC] say, no you can't do that." (Tr. 19:11-15, Oct. 20, 2020.) In an email correspondence with Ms. Silva, Petitioner explained that the Property is thirty feet from a coastal feature and rebuilding within the Town's setback requirements would place the new structure closer to the wetlands. (Silva Email at 2-3.) In response, Ms. Silva explained that moving closer to a coastal feature is "discouraged, unless necessary" and that Petitioner would have the burden of demonstrating that necessity to CRMC through a variance application. *Id*. at 2. Ms. Silva also stated that although using the existing foundation footprint would also require a CRMC variance, "the necessity is easier to demonstrate." *Id*.

B

Notice to Abutters

Following the required notice to abutters, Appellants—who own the property diagonally across West Beach Road from Petitioner—objected to the Application in a letter to the Zoning Board. *See generally* Objectors John & Jill Hayes's Letter. The letter stated that Appellants had owned their home for three years and that "[w]hen we purchased our home, one of the aspects of the home that most attracted us to it was the view we had of Quonochontaug Pond." *Id.* The letter stated that the zoning and setback restrictions applicable to the waterfront properties in Appellants' sightline to the pond were "a prominent decision-making factor in our purchase of this home, as we knew our site [*sic*] line of the Pond would be permanent." *Id.* Appellants argued that Petitioner's proposed additional two stories "further exacerbates an already nonconforming condition." *Id.*

Appellants are the only objectors to the Application on the record. Petitioner's immediate neighbors along West Beach Road sent emails of support to the Zoning Board. (Email

Correspondence of John DeMarche; Email Correspondence from Abutters Scott & Laura Woodford.) Three additional abutters expressed their support in writing, including one couple who owns two neighboring properties. (Email Correspondence from John Trainor; Correspondence from Abutter Marie Alvarado; Email Correspondence from Abutter Mark J. Keeley.) Although not abutters for the purpose of the statutory notice requirement, the Zoning Board received an additional email of support from residents at 124 West Beach Road. (Email Correspondence from Abutters John & Suzanne Olerio.)

C

Zoning Board Hearings

In consideration of Petitioner's Application, the Zoning Board conducted hearings on September 15, 2020, October 20, 2020, October 29, 2020, and November 17, 2020.

1

September 15, 2020 Hearing

The Board first took up Petitioner's Application at a September 2020 hearing. (Tr. 2:2-8, Sept. 15, 2020.) Petitioner and her husband, both unrepresented by counsel, provided an overview of the project and pointed the Zoning Board to the correspondence from various abutters expressing support. *Id.* at 3:11-8:10. Zoning Board member Joseph Quadrato voiced early concerns with the proposal, stating that although he had no objection to the use of the existing foundation with side and front setback relief, he was concerned with the overall size of the house increasing to three levels and 2,800 square feet. *Id.* at 8:19-10:13. Petitioners explained that the Property had served as a vacation home but that they now intended to make it their full-time residence. *Id.* at 13:23-14:2. They hoped to add one additional level of living space by expanding vertically, but in doing so, they incurred an obligation to fill in their basement in compliance with

FEMA. *Id.* at 12:18-13:17; 20:19-21:20. As a result of losing that space, the planned rebuild now included the third level for garage, storage, and mechanicals to compensate for the lost basement. *Id.* Member Quadrato responded that he took no issue with the garage or the first level of living space but that "least relief necessary" could be achieved by "cut[ting] down that square footage on the third level." *Id.* at 22:10-21.

Before granting a continuance at Appellants' request, Zoning Board Acting Chairwoman Robin Quinn[4] stated:

> "I wanted to remind everyone again that the relief they are asking for has nothing to do with the interior space of the home. It has to do with dimensional variances, setbacks and meeting the standards for dimensional variances. I understand why Mr. Quadrato—I understand that you're disturbed by the square footage on the third floor. I don't believe that is relevant to the application that's before us this evening." *Id.* at 23:14-24.

2

October 20, 2020 Hearing

At the October 20, 2020 hearing, Petitioner, now represented by counsel, provided an overview of the proposal and then addressed whether she had considered adjusting the design to comply with setback requirements. (Tr. 13:22-14:22, Oct. 20, 2020.) She answered affirmatively but stated that communications from CRMC expressed a preference for using the existing foundation and remaining further away from the coastal feature. *Id.* Petitioner was also concerned that adjusting the structure to the south would move it closer to the neighboring yacht club, a building that already encroached on Petitioner's property line. *Id.* Further, she explained that any

[4] Zoning Board Chairman Raymond Dreczko did not attend the first hearing addressing Petitioner's Application. (Tr. 4:2-3, Oct. 20, 2020.) He therefore abstained from voting on the Application but reserved the right to ask questions and participate throughout the hearings. *Id.* at 4:3-11. As a result of this abstention, Zoning Board Vice Chairwoman Robin Quinn served as acting chair for this Application. *Id.* at 4:11-12.

design requiring a shift to the south would potentially impact the existing well and the location of the new septic system. *Id.*

Asked whether she had discussed alternate design plans with contractors other than her chosen builder, Connecticut Valley Homes, Petitioner answered in the negative. *Id.* at 16:10-14. She explained that she opted for a prefabricated home given ongoing construction delays caused by COVID-19. *Id.* at 16:14-20. She did, however, state that she had discussed alternative designs with her builder. They had determined that angling away from the wetland feature would encroach on the yacht club to the south; and narrowing the footprint to the right and left would lengthen the design to the back, pushing closer to the coastal feature. *Id.* at 17:2-18. In Petitioner's opinion, her proposed plan to use the existing footprint and build up "was just the most feasible and practical way to place the house and the least environmental impact." *Id.* at 18:3-7.

Petitioner also offered testimony of two experts, James Houle as an expert in real estate appraisal and Scott Rabideau as an expert coastal biologist. *Id.* at 35:3-5, 46:21-48:5. Mr. Houle testified that he had reviewed Petitioner's proposal, read the Zoning Ordinance and the Town's Comprehensive Plan, and visited both the Property and the surrounding area and that Petitioner's proposed home was comparable in size to nearby properties, many of which had also been renovated and expanded. *Id.* at 36:9-37:2; 40:4-41:2. He expressed that placement of a structure on the subject Property was constrained by a number of factors including that it was a long, narrow nonconforming lot, proximately located to a coastal feature, and located relatively close to its neighbors. *Id.* at 38:4-39-19.

Mr. Rabideau next testified that any construction on the Property would be subject to CRMC buffer zone regulations. *Id.* at 51:4-16. He stated that those regulations, specifically § 1.1.11C, express a preference that property owners rebuild over an existing footprint "because

that's where the land has already been disturbed. You're trying to minimize disturbance in the coastal zone and focus the disturbance on areas that are currently developed for recreational use, human habitation, any of those uses." *Id.* at 52:4-22.[5] He explained that CRMC does not prohibit new foundations but would require proper erosion controls and ground stabilization to avoid short- and long-term negative impacts to the coastal resource. *Id.* at 53:10-19.

3

October 29, 2020 Hearing

On October 29, 2020, the Zoning Board reconvened and heard testimony from Ashley Sweet, Appellants' expert in community planning, land planning, and zoning. *See generally* Tr. 6:9-90:22, Oct. 29, 2020. Ms. Sweet testified to a number of issues, first stating that Petitioner's proposal necessitated a Special Use Permit, not just a dimensional variance, based on Ms. Sweet's interpretation of § 218-39 of the Charlestown Zoning Ordinance.[6]

Ms. Sweet next testified to the various factors required to be proven to obtain a dimensional variance. *See generally id.* at 21:1-31:21. She stated that Petitioner created her own hardship by

[5] The referenced regulation prescribes standards for coastal buffer zones. Section 1.1.11(C)(3) states, in relevant part:

> "c. Coastal buffer zones shall not be required when a structure is demolished and rebuilt on the existing footprint. Where a structure is demolished and rebuilt and will result in an expansion of the structural lot coverage such that the square footage of the foundation increases by fifty percent (50%) or more, a coastal buffer zone shall be established with a width equal to the percentage increase in a structure's footprint, multiplied by the value contained in § 1.1.11(C)(7)(a) of this Part (Table 4).
> "d. Where the applicant demolishes a structure, any contemporary or subsequent application to rebuild shall meet applicable setback requirements." 650 RICR 20-00-1.1(C)(3)(c)-(d).

[6] Section 218-39 states, in relevant part:

> "A. Existing Buildings and Uses. Any building or use, which was lawfully in operation at the time of the passage of this Ordinance but

choosing to tear down the existing structure and by limiting herself to a single builder. *Id.* at 21:8-16. In Ms. Sweet's opinion, the subject Property was not unique because it was of similar shape and size to other lots in the area. *Id.* at 22:5-10. Ms. Sweet also demonstrated how the footprint of the structure could fit within the setback requirements and concluded, as a result, that Petitioner's proposal did not seek the least relief necessary. *Id.* at 17:7-20:10, 22:16-23. She further stated that, even if Petitioner used the existing footprint on the ground floor, the higher levels should not be permitted to extend beyond the setback requirements because that would not be the least relief necessary. *Id.* at 15:3-9. In Ms. Sweet's opinion, the proposed structure would also impair the intent and purpose of the Town's Zoning Ordinance because the vertical expansion

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> is not in conformity with the provisions of this ordinance, shall be considered as a lawful nonconforming use.
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> * * *
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> "D. Change of Use/Intensification. The Zoning Board of Review may, as a special use permit, allow for the change of a nonconforming use to a nonconforming use of a more restrictive character to more closely adhere to the purposes and intent of this Ordinance. If a lawful nonconforming use is changed to a conforming use, it may not be changed back to a nonconforming use. A pre-existing nonconforming use of a building, structure, or land may be added to, enlarged, expanded or intensified by an additional footprint of not more than 50 percent in excess of the existing floor area, land or intensity used only if such addition, enlargement, expansion or intensification is approved by the issuance of a special use permit by the Zoning Board of Review, pursuant to the provisions of § 218-23 of this Ordinance, provided that any such alteration complies with all other dimensional and area requirements of this Ordinance in effect at the time such relief is sought." Zoning Ordinance, § 218-39.

would contradict the ordinance's purpose to "ensure control over an intensity of use" and "to protect neighbors from adverse impacts." *Id.* at 23:18-24:14.

Ms. Sweet questioned the basis of Mr. Houle's prior testimony that Petitioner's proposal would not adversely impact the surrounding area because homes in the area were comparable or larger, stating that Mr. Houle could not make an "apple to apple comparison" without knowing whether those other properties had also required dimensional variances. *Id.* at 30:20-31:1. Finally, because Petitioner's structure could be positioned within the setbacks, in Ms. Sweet's opinion, denying Petitioner's Application would be a mere inconvenience. *Id.* at 25:12-18.

Before Petitioner's counsel could begin cross-examining Ms. Sweet, he deferred to Zoning Board Chairman Ray Dreczko. *Id.* at 32:8-9. Mr. Dreczko stated, "I may have some questions I'd like to pose that may help with the cross-examination." *Id.* at 32:13-14. Mr. Dreczko proceeded to question Ms. Sweet, specifically about aspects of her testimony and a written report that she had prepared, which Appellants had submitted to the Zoning Board. *See generally id.* at 32:21-52:20. He asked Ms. Sweet to further explain her opinion as to the need for a Special Use Permit, *id.* at 32:23-34:2, 37:16, and to clarify several comments found in the written report, *id.* at 34:6-37:15-38:11. As Mr. Dreczko started to express that he disagreed with Ms. Sweet's position on the necessity for a Special Use Permit, Appellants' attorney objected, stating: "It almost sounds like you're cross-examining the witness as opposed to asking clarifying questions about the application or the testimony. I know Mr. Fracassa is going to cross-examine the witness. I guess I wasn't expecting others to as well." *Id.* at 38:12-24. Mr. Dreczko responded that he would withhold his

opinions and any "commentary that could be misconstrued as cross-examination" but would continue to pose questions as to the report and Ms. Sweet's expert testimony. *Id.* at 39:1-12.

Mr. Dreczko resumed questioning Ms. Sweet, asking that she clarify or explain various statements in her written report. *Id.* at 39:13-47:6. He then asked her about the area surrounding the subject Property:

> "MR. DRECZKO: Do those homes that are in that area—did they require any variances to become three-story homes?
> "MS. SWEET: I would not know that without checking.
> "MR. DRECZKO: Was it not your testimony earlier that to be able to testify against this application with regards to how a variance should or should not be applied one should have the background and knowledge of the rest of the neighborhood and what they went through?
> "[APPELLANTS' COUNSEL]: Objection.
> "MS. SWEET: That's different. That was under different circumstances. You're twisting those words into a situation that I didn't apply them to. My statement was if Mr. Houle wanted to say that because other homes get to be three stories than this one does, my point was that unless that was an apple to apple comparison it's not. I'm talking about general character of the neighborhood. I'm not necessarily opposing the concept of a three-story home. I'm opposing the concept of a three-story home that invades the setbacks.
> "MR. DRECZKO: Agreed.
> "MS. SWEET: It's allowed to expand additionally into the setbacks further than it already does at a single story.
> "MR. DRECZKO: Which again I don't know that I agree that it's different with the way I'm posing the question. I don't think I'm taking it out of context. First, let me qualify. I've already mentioned numerous times numerous applications. Every application stands on its own merit. However, when we are talking about the apples to apples comparison, again, if you don't know whether another homeowner in the neighborhood had sought a variance to put up a three-story home therefore invading on any of the rights of the neighborhood with respect to—the way the Applicant for this application before us is doing then it very well could be a common theme in the neighborhood could it not if they got approved?
> "[APPELLANTS' COUNSEL]: Objection.
> "MS. SWEET: I'm not sure how I would answer that question. The point is that I'm not looking specifically at a house to house comparison as Mr. Houle testified that he did. I'm talking about the

> importance of zoning setbacks in a district and what function they serve and what the repercussions are when you violate or allow violations of those setbacks in excess of the least relief necessary which is the position that I've taken on this application." *Id.* at 47:19-50:3.

Petitioner's attorney next cross-examined Ms. Sweet. *See generally id.* at 52:22-85:23. Asked whether she had ever appeared before CRMC, Ms. Sweet answered in the negative; and asked whether she knew why CRMC preferred the use of existing foundations in buffer zones, she answered, "[w]ithout reading the regulations, I can venture that they would prefer not to disturb the property." *Id.* at 56:16-23.

Following Ms. Sweet's testimony, the Zoning Board members made several comments on the record, asked clarifying questions of the Petitioner, and requested additional information. *See generally id.* at 91:4-121:10. Zoning Board member Mr. Quadrato also shared that he had communicated directly with Ms. Silva at CRMC and had received an email from her, which he read, in part, into the record:

> "As far as the foundation replacement, if a new foundation is a required element of a proposal and the proper erosion and sedimentation controls are utilized [CRMC] would [likely] have no issue. Then again, as I stated over the phone, CRMC would have no objection to relocating the dwelling in this way if the closest point of the structure to the coastal feature got no closer than it is currently." *See id.* at 115:2-10; *see also* Email Correspondence between Amy Silva & Board Member Joe Quadrato.

Finally, two sideline abutters testified in support of Petitioner. *See generally* Tr. 121:16-126:17, Oct. 29, 2020.) One testified that he preferred the existing footprint to avoid further encroachment on his sideline given that his building was also nonconforming and located quite close to Petitioner's Property. *Id.* at 122:1-123:11. The second abutter agreed that the existing

footprint was preferable and expressed that he would be concerned that digging a new foundation would create unnecessary risk to his property and his well. *See id.* at 124:8-125:18.

The Zoning Board was not prepared to vote on the Application and continued consideration to a future hearing. *Id.* at 137:11-23.

4

November 17, 2020 Hearing

At the final hearing on this Application, Petitioner presented the testimony of her builder, Scott Anderson. *See generally* Tr. 7:6-32:23, Nov. 17, 2020.) Mr. Anderson testified that he would not be able to use any of Petitioner's existing foundation if he built her new home within the setback by moving it over by several feet and adjusting its angle. *Id.* at 12:4-13. Mr. Anderson later testified, however, that the existing foundation could be "cut" or "ground" where not needed and otherwise added to in order to use it in part. *Id.* at 18:9-19:6, 27:1-10. Mr. Anderson explained that the current estimate to build Petitioner's proposed home using the existing foundation would require foundation work totaling $2,500-3,500 to infill the basement and cut out garage openings. *Id.* at 20:6-8. To demolish and carry away the existing foundation and construct a new one would, in his opinion, cost approximately $33,000 to $38,000. *Id.* at 11:11-21.

After closing arguments of counsel, two members of the Zoning Board indicated opposition to the Application. *Id.* at 97:12, 113:2-3. Zoning Board member Quadrato stated that he would not support this Application unless Petitioner "remove[d] [fifteen] feet off that third level . . . [s]even-and-a-half feet of which needs to be on the right side" or redesigned the proposal to comply with the right-side setback at all levels. *Id.* at 97:10-99:7. Acting Chairwoman Quinn later opined on Mr. Quadrato's proposal, stating that Petitioner was not seeking a height variance and that Mr. Quadrato's proposed compromise to the size of the third floor would be inappropriate in light of

the requested variance. *Id.* at 118:10-15. Zoning Board member Cliff Vanover indicated that he also would not grant the variance because Petitioner had created the hardship in the choice of her builder. *Id.* at 114:2-4.

Three Zoning Board members expressed their support for the Application. *Id.* at 111:8-10, 112:17, 121:2-4. Acting Chairwoman Quinn stated that she did not accept Ms. Sweet's testimony as to building or foundation placement because Ms. Sweet was not presented as a building expert, construction expert, or structural engineer. *Id.* at 108:1-8. Ms. Quinn acknowledged written statements in the record from William Dowdell, a structural engineer, and Ernest George, a professional engineer.[7] *Id.* at 108:8-12. Mr. George had stated that the current foundation was "in good condition and can be used for a two- or three-story addition." *See id.* at 108:11-14; *see also* Site Inspection Report. Mr. Dowdell had written that alternative design proposals within the setback requirements were not feasible as they would not allow adequate space for the existing well, access to the dock, or installation of the new waste-water treatment apparatus. *See* Tr. 109:11-21, Nov. 17, 2020; *see also* Correspondence from William D. Dowdell. Ms. Quinn also credited Petitioner's testimony that shifting the new structure within the setbacks would obstruct the use of the driveway, in addition to those items listed by Mr. Dowdell. (Tr. 110:12-22, Nov. 17, 2020.) The Acting Chairwoman moved to approve the Application. *Id.* at 111:8-10. Zoning

[7] Although Appellants argued that Mr. Dowdell's written statement "should not be afforded much weight," they did not otherwise object to the inclusion of that statement in the record before the Zoning Board. (Tr. 94:13-15, Nov. 17, 2020.). Appellants also did not object when Zoning Board member Wibeto took notice of Mr. George's "certified document" in the record. (Tr. 96:15-23, Oct. 29, 2020.)

Board member Lara Wibeto seconded "for the reasons stated by my Chairwoman." *Id.* at 112:20. Member John Lovoy also agreed with the Acting Chairwoman. *Id.* at 121:2-4.

Not having the support of at least four Zoning Board members, Acting Chairwoman Quinn proposed Mr. Quadrato's compromise to Petitioner. *Id.* at 123:19-24. Petitioner's husband responded that he did not understand how the size of the third floor could be at issue if the alternative proposal would not change the footprint or the variance requested. *Id.* at 124:1-6. Mr. Quadrato clarified that his concern was with the additional intrusion going from a fourteen-foot structure to a thirty-four-foot structure and expressed his view that it would not be a hardship for Petitioner to reduce the size of the top floor as the least relief necessary. *Id.* at 124:16-22, 126:4-9. After some discussion, Petitioner's husband acquiesced "if that's what you're dictating that we have to do." *Id.* at 128:13-21. Ms. Quinn responded, "No. That's a suggestion. [Fifteen] feet is a random thing. Based on what, Mr. Quadrato?" *Id.* at 128:22-24.

After this exchange, Mr. Vanover stated that he had second thoughts and that he now agreed with Petitioner's proposal. *Id.* at 129:8-11. The Zoning Board then voted 4-1 to approve the Application. *Id.* at 130:5-20.

D

Recorded Approval Letter and Appeal

The Zoning Board's approval letter (Recorded Approval Letter) reflecting the November 17, 2020 vote was recorded on December 9, 2020. *See generally* Recorded Approval Letter, Book 467, p. 635. In addition to summarizing the Petitioner's proposal and the member votes, the Recorded Approval Letter states:

> "A motion was made by Ms. Quinn and seconded by Ms. Wibeto to approve Application #1519. There would be no adverse impact on the public health, safety or the environment. It would amount to more than a mere inconvenience if the request was denied. The

> movement of the foundation would obstruct the use of the driveway, cause difficulty with access to the garage, encroach on the well and obstruct clear access to the dock. Moving the foundation would impede the applicant's ability to enjoy their property in the manner that they have for 20 years. The hardship is due to the deep and narrow size of the lot. There are no other design alternatives that are feasible. The house was in its current location when they purchased the property. It would not be out of character with the surrounding neighborhood. There are many two-level homes in the area. It is the least relief necessary as presented by Attorney Fracassa. They meet the five requirements for a dimensional variance. Mr. Quadrato stated that he did not believe it was the least relief necessary and that they are creating their own hardship. Mr. Quadrato suggested reducing the size of the second level of the living area of the home. He felt the request would be too intrusive as proposed. (4-1; Mr. Quadrato opposed)." *Id.* at 1.

Appellants filed an appeal with this Court on December 21, 2020. (Docket.) Before this Court, Appellants contend that: (1) the Zoning Board's decision is inadequate for judicial review because it "fails to resolve evidentiary conflicts, make the prerequisite factual determinations and/or apply the proper legal principles," (Appellants' Mem. 31); (2) Petitioner must obtain a Special Use Permit in accordance with § 218-39, (Appellants' Reply to Petitioner's Mem. 2, 13);[8] (3) the Zoning Board's decision to grant the Application was clearly erroneous in light of the whole record which fails to satisfy the requirements of §§ 45-24-41(d) and (e)(2), (Appellants' Mem. 10-

[8] Petitioner and the Zoning Board filed separate memoranda of law objecting to Appellants' appeal and asking this Court to affirm the Zoning Board's decision. In turn, Appellants filed separate reply memoranda. Where necessary, this Decision will differentiate between Appellants' reply to Petitioner and their reply to the Zoning Board.

25); and (4) Zoning Board members Dreczko and Vanover abused their discretion in the proceedings relating to this Application. (Appellants' Mem. 26-30.)

II

Standard of Review

The Superior Court's review of zoning board decisions is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

This Court must "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "Substantial evidence is defined as 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion[] and means [an] amount more than a scintilla but less than a preponderance.'" *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013) (quoting *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (internal quotation marks omitted)). If the Court finds

that the zoning "board's decision was supported by substantial evidence in the whole record," then the zoning board's decision must stand. *Lloyd,* 62 A.3d at 1083.

If the decision of the board does not contain sufficient findings of fact and conclusions of law to permit judicial review, the Court will remand the matter to the board so that the board may issue a ruling that is complete and susceptible to judicial review. *See Irish Partnership v. Rommel*, 518 A.2d 356, 359 (R.I. 1986).

Questions of law are reviewed *de novo*. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

III

Analysis

A

Adequacy of the Zoning Board's Findings and Conclusions

Appellants argue that the Zoning Board's decision was fatally inadequate for two reasons; first, that "the Decision fails to resolve evidentiary conflicts, make the prerequisite factual determinations and/or apply the proper legal principles," (Appellants' Mem. 31); and second, that there is no evidence in the record that the Board approved the written decision. (Appellants' Mem. 33.) The Zoning Enabling Act of 1991 mandates that a zoning board "include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote" and that "[d]ecisions shall be recorded and filed in the office of the city or town clerk within thirty (30) days from the date when the decision was rendered." Section 45-24-61(a).[9] Our Supreme Court has also "long held that 'a zoning board of

[9] The Town's Zoning Ordinance similarly provides that:

> "Following a public hearing, the Board shall render a decision within forty-five days. The Board shall include in its decision all

review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.'" *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)).

The Recorded Approval Letter in conjunction with the Zoning Board members' statements during the November 17, 2020 vote include sufficient factual findings and legal conclusions to facilitate judicial review. "Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." *May-Day Realty Corp. v. Board of Appeals of City of Pawtucket*, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970). The Recorded Approval Letter summarizes the proper standard from § 45-24-41(d), and immediately following each required element, the letter provides brief supporting factual detail, such as the deep and narrow size of the lot, the existence of other multi-level homes in the area, and the infeasibility of design alternatives that would encroach on the Property's well or impede other access. *See generally* Recorded Approval Letter. Contrary to Appellants' assertion that there "was no discussion of reasonable alternatives" and that the Zoning Board's decision fails to explain why Mr. Quadrato's proposals were unreasonable, the record is replete with discussions of alternatives, and Acting Chairwoman Quinn intimated throughout the proceedings that Mr. Quadrato's proposal was "random" or arbitrary because reducing the size of the top floor would

> findings of facts, conditions, the vote of each member participating thereon, the absence of a member or failures to vote. All decisions shall be filed in the Building Inspector's Office within twenty working days, and shall be a public record." Zoning Ordinance, § 218-20.

in no way reduce the relief requested from the right-side setback requirement. *Apostolou*, 120 R.I. at 507, 388 A.2d at 824 (reviewing court examines the "whole record").

Acting Chairwoman Quinn also articulated her reasoning for supporting the Application during the November 17 hearing, and members Wibeto and Lovoy "agreed with the Chairwoman" and "for the reasons stated by my Chairwoman." (Tr. 112:17-20, 121:2-4, Nov. 17, 2020.) Ms. Quinn moved to approve the Application for the reasons that she had provided in her summary preceding the vote, and Mr. Vanover voted in agreement, implicitly adopting that reasoning. *Id.* at 129:12-18, 130:9. Therefore, the Acting Chairwoman's reasoning, the Recorded Approval Letter, and the record taken as a whole provide an adequate basis for judicial review. *Accord New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 644 (R.I. 2021) (reviewing record to identify "minimally sufficient findings to enable judicial review").

As to Appellants remaining argument, nothing in the State Enabling Act, the Town's Zoning Ordinance, or our case law requires that the Zoning Board's reasoning be entirely expressed in written form. *See Thorpe v. Zoning Board of Review of Town of North Kingstown*, 492 A.2d 1236, 1237 (R.I. 1985) (explaining "that the minimal requirements for a decision . . . would be the making of findings of fact and the application of legal principles in *such a manner* that a judicial body might review a decision with a *reasonable understanding*") (emphasis added). The key consideration is whether this Court would resort to speculation as to the Zoning Board's factual findings and legal conclusions, or whether those findings and conclusions can be readily determined from the Zoning Board's decision. *Our Lady of Mercy Greenwich, R.I. v. Zoning Board of Review of Town of East Greenwich*, 102 R.I. 269, 274, 229 A.2d 854, 857 (1967). In this matter, Acting Chairwoman Quinn stated her reasoning on the record as she moved for a vote to approve, three board members agreed with her stated reasons, and the Recorded Approval Letter

reflects that reasoning. This Court can therefore look to those statements without resorting to impermissible speculation.

B

Appropriate Vehicle for Relief: Special Use Permit or Dimensional Variance

In a reply memorandum, Appellants argue that the appropriate vehicle for Petitioner's request is a Special Use Permit and not a dimensional variance. (Appellants' Reply to Petitioner's Mem. 2, 13.) Notwithstanding the propriety of failing to include this argument in their opening brief, this Court disagrees with Appellants' construction of § 218-39 of the Town's Zoning Ordinance. Both the State Zoning Enabling Act and the Town's Zoning Ordinance explicitly distinguish between a use variance and a dimensional variance, defining a "use" as "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained," § 45-24-31(65); and defining a "use variance" as "[p]ermission to depart from the use requirements of a zoning ordinance[.]" *See* § 45-24-31(66)(i); *see also* Zoning Ordinance § 216-5 (adopting these definitions). A dimensional variance, on the other hand, is "[p]ermission to depart from the dimensional requirements of a zoning ordinance." Section 45-24-31(66)(ii); Zoning Ordinance § 216-5. Similarly, the Enabling Act distinguishes between a use nonconformance and a dimensional nonconformance:

> "(52) Nonconformance. A building, structure, or parcel of land, or use thereof, lawfully existing at the time of the adoption or amendment of a zoning ordinance and not in conformity with the provisions of that ordinance or amendment. Nonconformance is of only two (2) types:
> "(i) Nonconforming by use: a lawfully established use of land, building, or structure that is not a permitted use in that zoning district. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance is nonconformity by use; or
> "(ii) Nonconforming by dimension: a building, structure, or parcel of land not in compliance with the dimensional regulations of the

> zoning ordinance. Dimensional regulations include all regulations of the zoning ordinance, other than those pertaining to the permitted uses. *A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance is nonconforming by use; a building or structure containing a permitted number of dwelling units by the use regulations of the zoning ordinance, but not meeting the lot area per dwelling unit regulations, is nonconforming by dimension*." *See* Section 45-24-31(52) (emphasis added); *see also* Zoning Ordinance § 218-5(B).

As explained by the italicized section of this latter definition, a parcel can be utilized for a *conforming use*—for a multi-family dwelling, for example—while the building on the parcel may be *nonconforming by use* if the building contains more units than otherwise provided in the zoning ordinance; or the building may be conforming by use with the proper number of units but *nonconforming by dimension* if its footprint or height violates the ordinance's dimensional standards. With these distinctions in mind, reference to both "buildings" and "uses" in § 218-39—which addresses "lawful nonconforming *use*" and "change[s] in *use*"—means only those parcels and/or buildings that are nonconforming *by use*. This interpretation is further supported by the fact that the Town's Zoning Ordinance includes entirely separate sections addressing use and dimensional requirements, *compare* Zoning Ordinance, art. VI *with id.* at art. VII; and grants authority to the Zoning Board to authorize variances as separate and distinct from Special Use Permits. *See* Zoning Ordinance §§ 218-22(D)-(E).

To read § 218-39(A) as inclusive of buildings that are nonconforming *only* by dimension would obviate the need for a dimensional variance and would therefore impermissibly render all references to variances throughout the Zoning Ordinance mere surplusage. *Rhode Island Department of Mental Health, Retardation and Hospitals v. R.B.*, 549 A.2d 1028, 1030 (R.I. 1988)) ("[t]his [C]ourt has long applied a canon of statutory interpretation which gives effect to

all of a statute's provisions, with no sentence, clause or word construed as unmeaning or surplusage").

C

Dimensional Variance Standard

Having affirmed that a dimensional variance request is the proper form of relief, we turn to Appellants' alternative argument that the Zoning Board's decision is "clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record" as to every element of the dimensional variance standard found in §§ 45-24-41(d) and (e). (Appellants' Mem. 7.) This Court's mandate on appeal is not to "substitute its judgment for that of the [Z]oning [B]oard," but to examine the record for substantial evidence supporting the Zoning Board's determination. *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

1

Section 45-24-41(d)(1), Hardship

To obtain a dimensional variance, an applicant must first demonstrate "[t]hat the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area[.]" Section 45-24-41(d)(1). Appellants argue that Petitioner's "deep and narrow" lot is typical of the surrounding area and therefore not unique. (Appellants' Mem. 21.) Alternatively, Appellants contend that even if the lot is considered unique, its depth and narrowness are unrelated to the relief sought. *See id.* (citing *Alpert v. Middletown Zoning Board of Review*, No. 2003-0436, 2004 WL 1542238, at *8 (R.I.

Super. June 28, 2004) ("It is axiomatic . . . that the least relief necessary is that which ameliorates the hardship justifying the variance.").)[10]

Appellants' argument ignores that "'it is well recognized that the irregular shape or other peculiar characteristics of a parcel may constitute a hardship unique to the property which justifies the granting of a variance.'" *Cassese v. Zoning Board of Review for the Town of Middletown*, No. NC 10-0293, 2012 WL 115456, at *6 (R.I. Super. Jan. 11, 2012) (quoting 3 *Rathkopf's The Law of Zoning & Planning* § 58:11, at 58-68 to 58-69 (4th ed., rev. 2006). Yet, even accepting Appellants' argument that the surrounding area is comprised of deep and narrow lots, there is nevertheless substantial additional evidence in the record establishing Petitioner's unique hardship.

The subject property is a prior nonconforming substandard lot with a nonconforming structure that encroaches into the front- and left- setback areas. *See* Assessor's Card at 1; Appl. at 2.; *see also Rathkopf, supra*, § 58:20 at 58-129 ("Hardship must relate to some characteristic of the land for which the variance is requested, and must not be *solely* based on the needs of the owner.") Further, Petitioner's personal circumstances have changed, and the property will no longer be used as a vacation home, but as her primary residence. *See Cassese*, 2012 WL 115456, at *6 n.2 (observing prior case law has not foreclosed consideration of personal circumstances as a *factor* in a hardship analysis.) As such, she desires to make the structure more amenable to full-time use and more resilient. (Tr. 13:23-14:3, Sept. 15, 2020.) Her renovation efforts will trigger FEMA and CRMC requirements, which will cause her to lose her existing basement storage space and otherwise constrain the placement of the new structure and the required elevation of the living

[10] Parties may refer to unpublished opinions when instructive, although they "have no precedential value." *Whitaker v. State*, 199 A.3d 1021, 1031 (R.I. 2019).

level. (Appl. at 1; Tr. 13:1-5, 26:2-7, 51:8-16, 56:23-57:4, Oct. 20, 2020; Tr. 9:11-10:21, Sept. 15, 2020.) Finally, the nearness of the abutting yacht club, the current position of the Petitioner's existing well, and the need to allow access to the existing dock all limit the positioning of a structure on the lot. (Tr. 13:22-14:22, Oct. 20, 2020; Tr. 109:11-21, Nov. 17, 2020.) In light of the foregoing substantial evidence of the lot and structure's unique characteristics, this Court will not substitute its judgment for that of the Zoning Board. *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

Because the evidence of Petitioner's hardship involves more than the mere depth and narrowness of the lot, Appellants' further argument that the relief is not "forced" by the hardship is rendered obsolete. Petitioner desires more space to accommodate her evolving use of the structure and wishes to avoid further encroachment on her immediate neighbors and the coastal feature by utilizing the existing foundation. As such, Petitioner's requested relief flows directly from the hardships described above. Section 45-24-41(d)(1) (requiring that the relief sought relate to the identified hardship).

2

Section 45-24-41(d)(2), Nature of the Hardship

Appellants next argue that Petitioner has created her own hardship by demolishing the existing structure. (Appellants' Mem. 18-21.) While it is true that an applicant's hardship must not be "the result of any prior action of the applicant," § 45-24-41(d)(2), following Appellants' argument to its logical conclusion would foreclose all dimensional variance requests. All variances arise from an applicant's desire to make some change to their property. *See* § 45-24-31(66) (defining "variance"). If that fact alone mandated denial of a dimensional variance request, no application could ever be granted. This Court declines to adopt such an interpretation of § 45-

24-41(d)(2). *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012) ("under no circumstances will [the] Court construe a statute to reach an absurd result")

3

Section 45-24-41(d)(3), Character of the Surrounding Area

Appellants next challenge whether granting Petitioner's requested variance would impermissibly "alter the general character of the surrounding area[.]" Section 45-24-41(d)(3). As to this requirement, Appellants argue that "[t]here are no three-story houses on [Petitioner's] side of West Beach Road along the stretch on which [Petitioner] resides." (Appellants' Mem. 22.) This Court has identified no authority that "surrounding area" is defined in such a narrow manner. Instead, our Supreme Court has provided examples of when a proposal would alter the general character of a surrounding area. *See Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 693 (R.I. 2003) (structures that are "massive or out of place" or a variance that would "eliminate the front yard or sidewalk in a residential neighborhood").

Here, the Zoning Board credited that Petitioner's proposal seeks to utilize the existing footprint as constituted since 1956, with no further encroachment of any setback area. (Tr. 107:5-7, Nov. 17, 2020.) Further, the Zoning Board relied on the testimony of Petitioner's real estate expert, Mr. Houle, in determining that the proposed structure would not alter the character of the area. *Id.* at 112:2-8. Appellants contend, however, that "'if the expert fails specifically to set forth the factual basis for his conclusion, the court must disregard his testimony.'" *See* Appellants' Mem. 23 (quoting *Ferland Corp. v. Bouchard*, 626 A.2d 210, 214 (R.I. 1993)). Contrary to this assertion, Mr. Houle did establish the basis for his opinion; namely, that he had reviewed Petitioner's proposal, read the Zoning Ordinance and the Town's Comprehensive Plan, and visited both the Property and the surrounding area. *Id.* at 36:9-37:2; 40:4-41:2. Appellants' expert, Ms.

Sweet, had not visited the area, but was familiar with it nevertheless, and also confirmed that it contained other three-story homes. (Tr. 47:16-18, Oct. 29, 2020.)

Ms. Sweet took issue with the Application as adversely impacting the area only insofar as it "invades the setbacks." *Id.* at 48:18-19. As discussed above, however, if the mere fact that a proposal invaded the setbacks violated the character of the surrounding area—*such invasion being the very reason for the dimensional variance*—no dimensional variance could ever be granted. Where "conflicting testimony was presented at the hearings, the board is vested with discretion to accept or reject the evidence presented . . . This court, on the other hand, is restrained from weighing the evidence or substituting our judgment for the board's." *Bellevue Shopping Center Associates v. Chase*, 574 A.2d 760, 764 (R.I. 1990).

4

Section 45-24-41(d)(4), Least Relief Necessary

Applicants must submit evidence to the Zoning Board demonstrating "'[t]hat the relief to be granted is the least relief necessary.'" *New Castle Realty Co.*, 248 A.3d at 647 (quoting § 45-24-41(d)(4)). "Least relief" means that "the burden is on the property owner to establish that the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted." *See Standish-Johnson Co. v. Zoning Board of Review of City of Pawtucket*, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968); *Watch Hill Fire District v. Westerly Zoning Board of Review*, No. WC-2021-0195, 2022 R.I. Super. LEXIS 76, at *16-19 (R.I. Super. Oct. 20, 2022) (explaining proper legal standard in light of the *New Castle Realty Co.* opinion). Here, the Zoning Board determined that there were "no other design alternatives that [were] feasible." (Recorded Approval Letter at 1). As Acting Chairwoman Quinn explained at the November hearing, the Zoning Board credited Petitioner's building experts and did not rely on

Ms. Sweet's testimony as to building placement because "she was not presented as a building expert or a construction expert or structural engineer." (Tr. 108:1-3, Nov. 17, 2020.) Mr. George stated that the existing foundation was in good condition, *id.* at 108:11-14; and Mr. Dowdell submitted that utilizing the existing footprint was the only feasible design that would allow adequate access to the well and the dock and permit construction of the new onsite wastewater treatment system, *id.* at 109:15-21. Acting Chairwoman Quinn opined that requiring an applicant to tear out a usable existing foundation would not be a "reasonable approach." *Id.* at 110:22-111:7. She reasoned that just because an alternative proposal is "physically possible" does not make it reasonable. *Id.* As already noted above, it is the Zoning Board's prerogative to accept, reject, and otherwise weigh conflicting expert testimony, and this Court must not substitute its judgment for that of the Zoning Board's. *Bellevue Shopping Center Associates*, 574 A.2d at 764.

Nevertheless, Appellants assert that Zoning Board member Quadrato's two alternative proposals were feasible contrary to the Zoning Board's determination. (Appellants' Mem. 10.) The first proposal involved reducing the size of only the top floor, which Appellants argue would "amount[] to far less dimensional relief than what was proposed in the Application." *Id.* The second option was for Petitioner to build within the setbacks by either partially utilizing the existing foundation or by building a new foundation with proper erosion controls to satisfy CRMC. *Id.* at 12-18. To the extent that the Zoning Board discredited these alternative proposals because they may be more costly for Petitioner, Appellants argue that additional costs do not render an alternative unreasonable. *See id.* at 16 (citing *Franco v. Zoning Board of Review of Town of Smithfield*, 90 R.I. 210, 215, 156 A.2d 914, 917 (1959)). This contention is easily resolved in Appellees' favor, however, because neither the Recorded Approval Letter nor the Zoning Board's

reasoning, as explained by the Acting Chairwoman, reference cost as a factor in the decision. (Recorded Approval Letter 1; Tr. 106:21-112:16, Nov. 17, 2020.)

Appellants are therefore left to contend that this Court's recent decision in *Caldwell, Jr. v. Zoning Board of Review of the Town of Narragansett*, No. WC-2018-0005, 2022 WL 842569, at *1 (R.I. Super. Mar. 15, 2022) "requires the denial of [Petitioner's] application." (Appellants' Mem. re: Recent Super. Ct. Auth. 2.) Appellants read *Caldwell* too broadly. *See Watch Hill Fire District*, 2022 R.I. Super. LEXIS 76, at *16-19; *Bomar v. Gloucester Zoning Board of Review*, No. PC-2020-7835, 2022 R.I. Super. LEXIS 72, at *20-23 (R.I. Super. Oct. 6, 2022). As Appellants point out in their supplemental briefing to this Court, the *Caldwell* court was tasked with reviewing the Narragansett Zoning Board's *denial* of Caldwell's application. (Appellants' Mem. re: Recent Super. Ct. Auth. 1.) On appeal, the *Caldwell* court did not conduct a *de novo* review, but instead rightfully looked to determine whether substantial evidence in the record supported that denial. *Caldwell, Jr.*, 2022 WL 842569, at *10-11. *Accord Franco*, 90 R.I. at 215, 156 A.2d at 917 ("[F]ind[ing] no evidence in the record upon which the board could have granted a variance."). *Caldwell* and *Franco* therefore differ from this appeal in a very significant aspect—they addressed variance application denials while this Court reviews an approved Application. The standard of review is deferential and looks only for substantial evidence in the record to support the Zoning Board's decision. *See H. J. Bernard Realty Co. v. Zoning Board of Review of Town of Coventry*, 96 R.I. 390, 394, 192 A.2d 8, 11 (1963); *see also DelPonte v. Johnston Zoning Board of Review*, No. PC-2021-07059, 2022 R.I. Super. LEXIS 77, at *9 (R.I. Super. Oct. 24, 2022) (explaining that the deferential standard of review means "similar cases can have differing outcomes that are nevertheless upheld on appeal as long as the evidentiary record is adequate.").

As summarized above, the Zoning Board relied on substantial evidence in the record that Petitioner's Application represented the least relief necessary and that alternative proposals were otherwise unreasonable. It is worth noting that Zoning Board member Quadrato later abandoned his proposal that Petitioner move the foundation, acknowledging that such a request would be an unnecessary "hardship." (Tr. 116:2-3, Nov. 17, 2020.) As it relates to his other proposal to reduce only the size of the top floor, the record supports the conclusion that this alternative would not alter the variance requested and would not have lessened the encroachment on the coastal feature. *Id.* at 121:14-24. Mr. Quadrato's proposal was therefore distinguishable from the alternative at issue in *Caldwell*. *See* Appellants' Mem. re: Recent Super. Ct. Auth. 1 (observing Zoning Board in *Caldwell* "found that a reduction in the dwelling footprint would serve to reduce the length and/or linear distance of the front-setback variance requested and would also increase the distance from the coastal feature thereby reducing the size of the variance requested from Coastal Resources Overlay District.").

Appellants contend, however, that Mr. Quadrato's proposal to reduce the size of the top floor was nevertheless reasonable because the Zoning Board was permitted to regulate the "volume" of the new structure. (Appellants' Reply to Petitioner's Mem. 15.) They argue that "there is simply no justification for the excessive vertical encroachment . . . beyond the existing building height." (Appellants' Mem. 17.) Yet, the record shows that Petitioner's proposal complied with height restrictions. (Appl. at 2). Further, any power of the Zoning Board to regulate "intensity"—which Appellants inexplicably equate with the "volume" of a structure notwithstanding the fact that the Zoning Ordinance addresses "intensity . . . of *activities*"—was permissive. *See* Zoning Ordinance § 218-22(I) (stating Zoning Board "may" apply special conditions").

In a final attempt to bolster the reasonableness of Mr. Quadrato's proposal, Appellants' rely on Petitioner's "acceptance" of the proposal as evidence of its reasonableness. (Appellants' Mem. 11, 24.) First, the record clearly indicates that there was no such acceptance where Petitioner's husband stated only: "We will reduce the size of the second story. We don't want to, but if that's the only way we are going to get approval." (Tr. 128:14-17, Nov. 17, 2020.) Second, effectuating this proposal would have no effect on the relief requested because—contrary to Appellants' assertion that setback relief "is not simply limited to that part of the structure that connects to the ground surface," (Appellants' Mem. 10)—the Zoning Ordinance addresses only linear encroachment into the setback area and does not otherwise regulate three-dimensional mass. *See* Appl. at 3. As Appellant has argued, the relief must relate to the hardship suffered, and the proposal to reduce the size of the top floor would simply have no ameliorating effect on the requested setback relief.[11]

D

Zoning Board Members' Conduct

1

Member Dreczko

Appellants rely on *Barbara Realty Co. v. Zoning Board of Review of City of Cranston*, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957) to support their contention that Mr. Dreczko demonstrated

[11] Appellants' remaining challenge to the proper application of the dimensional variance standard is that Petitioner failed to present evidence to the Zoning Board satisfying § 45-24-41(e)(2). (Appellants' Mem. 25-26.) Their argument on this point is merely a cursory restatement of their argument as to "least relief necessary." *Id.* In sum, they contend that "[s]ince reasonable alternative design options were established, including the Quadrato Proposal, the [d]ecision approving the requested relief was in error." *Id.* at 26. It is unnecessary to address this argument in the context of § 45-24-41(e)(2) when this Decision has already addressed that argument at length.

an impermissible bias against Appellants' expert, Ms. Sweet, during the October 29, 2020 hearing. (Appellants' Mem. 26-27.) They further rely on their own characterization of Mr. Dreczko's questioning of Ms. Sweet as a "full inquisition" with "raucous vigor and tone" that was "primed to help" Petitioner's counsel, otherwise "exhibiting a tone that signaled what appeared to be an intent to discredit the witness and influence other Board members," by "corner[ing]" Ms. Sweet, and appearing alternatively "pleased at the notion of having 'trapped' Ms. Sweet" or "deflated" when Ms. Sweet explained herself and then "eager to move onto the next 'trap.'" *Id.* at 26-28.

"In the absence of a direct attack upon the integrity and impartiality of the board and evidence to support such attack, we shall assume that they have acted with propriety." *Morin v. Zoning Board of Review of City of Warwick*, 89 R.I. 406, 411, 153 A.2d 149, 151 (1959). Putting aside Appellants' provocative characterization of Mr. Dreczko's questioning at the October 29 hearing, they otherwise make no direct attack on Mr. Dreczko's impartiality that would defeat the afforded presumption. There is no evidence that Mr. Dreczko had predetermined the issues in controversy. *Cf. Barbara Realty Co.*, 85 R.I. at 155-56, 128 A.2d at 343-344 (assessing whether board member had prejudged a requested use variance). In fact, Mr. Dreczko did not vote on this Application and recommended at the conclusion of the October 29 hearing that the voting members take their time to deliberate and not rush to vote. (Tr. 106:1-8, Oct. 29, 2020.) There is also no evidence that Mr. Dreczko was personally conflicted or otherwise subject to outside influence. *Cf. Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982) (addressing whether agency director's business interests created a conflict of interest with his public duties); *Morin*, 89 R.I. at 410, 153 A.2d at 151 (noting argument that "certain political practices infect zoning board decisions"). On the contrary, when Petitioner attempted to criticize Appellants' challenge as a veiled attempt to secure their unprotected view over Petitioner's property, Mr. Dreczko admonished her, stating that

Appellants had a right to present their opposition to the setback variance requests. (Tr. 99:13-100:2, Oct. 20, 2020.)

"[I]t should go without saying that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways," *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 n.6 (R.I. 2008), including by examination of members of the Zoning Board. *Restivo v. Lynch*, 707 A.2d 663, 671 (R.I. 1998). That Mr. Dreczko opted to question Ms. Sweet before Petitioner's counsel to "help" should be viewed in the context of the entire proceeding. Consideration of this Application had now extended into a third hearing being conducted in the evening hours. Mr. Dreczko had previously requested that counsel be "a little more direct" with their questioning and "hone in to get to the point." (Tr. 26:19-20, 28:15-16, Oct. 20, 2020.) At the conclusion of Ms. Sweet's direct testimony, Mr. Dreczko recognized that he could either interrupt counsel's questioning to pose his inquiries, hold his questions to the end and risk a less-than-efficient series of questioning by opposing counsel, or he could ask a series of upfront questions that would "help" move the proceedings along. *Id.* at 32:10-18. There is no prohibition against a zoning board member engaging in such questioning generally, or against this order of questioning specifically. *See Restivo*, 707 A.2d at 671; *see also* Roland F. Chase, *Rhode Island Zoning Handbook* § 118 at 115 (3d ed. 2016) ("[Z]oning boards are not merely passive receivers of whatever information is presented to them; they should take an active role in ferreting out relevant information.").

2

Member Vanover

Finally, Appellants contend that Zoning Board member Vanover's decision in this matter was a "sudden and profound change of heart based on his bedtime," and they argue, without

providing any authority to this Court, that such a reversal is an abuse of discretion. (Appellants' Mem. 28-30.) Appellants reason that after Mr. Vanover stated his opposition to the Application, he commented on the late hour, stated he was "exhausted," and changed his vote. (Tr. 114:2-4, 123:3-5, 129:8-11, Nov. 17, 2020.)

First, contrary to Appellants' narrative, Mr. Vanover's comment that he was "exhausted" did not immediately coincide with his decision to modify his earlier tentative vote. *Id.* at 123:3-5, 129:8-11. This temporal disconnect militates against any inference that exhaustion was Mr. Vanover's only concern. Second, Appellants fail to acknowledge that after stating his initial position, Mr. Vanover heard further discussion and acknowledged that he was "conflicted by this application." *Id.* at 122:10-11. Thereafter, there occurred several transcript pages of discussion of Mr. Quadrato's proposed alternative to reduce the size of the top floor, including Petitioner's husband's response that he did not understand how reducing the size of that level would impact the variance requested, and Acting Chairwoman Quinn's opinion that the proposal was therefore "random." *See generally id.* at 123:7-129:6. Any number of statements in those intervening minutes could have swayed Mr. Vanover's vote. Board members are afforded a presumption of propriety, *Morin*, 89 R.I. at 411, 153 A.2d at 151, and the mere fact that a member modifies his vote after hearing further discussion of the issues in controversy is insufficient evidence to overcome that presumption.

Lastly, § 45-24-61(a) requires that the Zoning Board—as a body—must include "in its decision all findings of fact and conditions, showing the vote of each participating member." Section 45-24-61(a). The Zoning Board's Recorded Approval Letter complies with these requirements, and there is no further obligation that the individual reasoning of each member be separately stated. *See generally* Recorded Approval Letter at 1-2; *see also Sambo's of Rhode*

Island, Inc. v. McCanna, 431 A.2d 1192, 1193 (R.I. 1981) ("The determination must contain findings of fact which support the ultimate decision *of the body*.") (emphasis added).

IV

Conclusion

After review of the entire record, this Court finds that the Zoning Board's decision was supported by the substantial and probative evidence on the record and was not clearly erroneous, arbitrary or capricious, made upon unlawful procedure, in violation of ordinance provisions, or otherwise an abuse of discretion. Accordingly, no Special Use Permit is required, and the Zoning Board's decision, as documented in the Recorded Approval Letter, granting Petitioner's Application for a dimensional variance is affirmed. Counsel shall submit an appropriate order for entry in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**John and Jill Hayes v. Charlestown Zoning Board of Review, et al.**
CASE NO:	**WC-2020-528**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**October 26, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Appellant:	**Douglas J. Emanuel, Esq.**
For Appellee:	**Wyatt A. Brochu, Esq.; Kelly M. Fracassa, Esq.**